82-1766

No. 82-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SECURITIES INDUSTRY ASSOCIATION,
Petitioner,

—v.—

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, et al.,
Respondents.

A. G. BECKER INCORPORATED,
Petitioner,

—v.—

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, et al.,
Respondents.

JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

At issue is an unprecedented administrative construction of the Glass-Steagall Act, the primary federal statute governing the basic structure of the financial services industry in this country. This remedial statute, enacted as a result of the national banking crisis fifty years ago, prohibits banks flatly and entirely from underwriting any corporate "notes or other securities." The specific questions presented are:

1. Did the majority below err in holding that the Federal Reserve Board is free to "adapt" on a "case-by-case" basis the flat prohibition of the Glass-Steagall Act against bank underwriting of corporate notes, when Congress itself has repeatedly refused to grant any exemptive authority over the Act's flat prohibition to any administrative agency?

2. Did the majority below err in acceding to a ruling of the Federal Reserve Board that allows banks to underwrite short-term corporate notes, when even the Board concedes that such notes are within the plain language of the Glass-Steagall Act and this Court repeatedly has instructed that the statutory language is to be construed broadly and applied literally?

PARTIES TO THE PROCEEDING

In addition to the petitioners* and respondents listed in the caption, the following are also respondents in these consolidated actions: Paul A. Volcker as Chairman of the Board of Governors of the Federal Reserve System, Frederick H. Schultz, Nancy H. Teeters, J. Charles Partee, Henry C. Wallich, Emmet J. Rice and Lyle E. Gramley as Members of the Board of Governors of the Federal Reserve System.

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* Pursuant to Rule 28.1 of this Court, petitioners state as follows: The Securities Industry Association is a national trade association representing more than 540 securities brokers, dealers and underwriters who are responsible for over 90 percent of the securities brokerage and investment banking business in the United States. The parent of petitioner A. G. Becker Incorporated is A. G. Becker Paribas Group Incorporated.

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Petitioners, the Securities Industry Association ("SIA") and A. G. Becker Incorporated ("A. G. Becker"), respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit (Tamm and Wilkey, J.J.; Robb, J. dissenting), entered in these consolidated proceedings on November 2, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (1a)[1] is reported at 693 F.2d 136. The decisions of the Court of Appeals for the District of Columbia Circuit denying, by a split vote, a joint petition for rehearing (95a) and suggestion for rehearing *en banc* (97a) are unreported.

The opinion of the District Court for the District of Columbia granting summary judgment in favor of petitioners (39a) is reported at 519 F. Supp. 602. The administrative determination of the Board of Governors of the Federal Reserve System ("Board") in response to petitions by the SIA and A. G. Becker (65a) is unreported, and the Board's subsequent "Policy Statement Concerning the Sale of Third Party Commercial Paper by State Member Banks" (87a) is reported at 46 Fed. Reg. 29333 (June 1, 1981).

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on November 2, 1982. A timely petition for rehearing and suggestion for rehearing *en banc* was filed on December 17, 1982 and was denied by an order entered on February 2, 1983. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

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1 Citations herein to material printed in the Appendix appear as "____a".

STATUTES INVOLVED

Involved in these actions are two sections of the Glass-Steagall Act.[2] Section 16 of the Act provides, in part:

> [A national bank] shall not underwrite any issue of securities or stock; . . . .

12 U.S.C. § 24 (Seventh) (Supp. 1982). Section 21 of the Act provides, in part:

> [I]t shall be unlawful . . . [f]or any person, firm, corporation, association, business trust, or other similar organization, engaged in the business of issuing, underwriting, selling, or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor. . . .

12 U.S.C. § 378(a)(1).

STATEMENT OF THE CASE

A. The Administrative Proceedings

In 1978 Bankers Trust Company, a commercial bank, initiated an aggressive campaign to convince existing and prospective corporate customers to distribute their commercial paper

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2 What is generally known as the Glass-Steagall Act was enacted as part of the Banking Act of 1933, 48 Stat. 162, and is codified in various sections of Title 12 of the United States Code. Relevant to this action are sections 16 and 21 of the Act, 12 U.S.C. §§ 24 (Seventh) and 378. The terms of section 16, which expressly apply to national banks, are also made applicable to state member banks of the Federal Reserve System, such as Bankers Trust Company, by 12 U.S.C. § 335.

(*i.e.*, unsecured short-term promissory notes) through the bank, rather than through securities dealers. Bankers Trust then began marketing third-party commercial paper notes to non-bank purchasers—the first time any bank had done so in the nearly 50 years since the Glass-Steagall Act was enacted.

The SIA, representing over 90 percent of the securities firms in the country, and A. G. Becker, a major dealer in commercial paper, separately petitioned the Board to declare that the bank's activity violated the Glass-Steagall Act and to order the bank to cease and desist from its third-party commercial paper activity. (41a.)

The Board denied the petitions. Although the Board recognized that the issues involved were primarily legal in nature, conceded that the statute expressly precludes banks from underwriting "notes," and admitted that commercial paper comprises short-term notes, the Board concluded that the statute should not be accorded a literal reading. (69a, 74a, 86a.) The Board instead adopted a "functional" analysis which, ignoring the bank's role in the distribution of these notes, concluded that their sale was the equivalent of a commercial loan and therefore was appropriate for any type of bank participation. (78a.)

The Board's ruling, however, also recognized the "potentially unsound" practices that might proliferate if banks generally were to begin dealing in commercial paper. The Board therefore issued "guidelines" to govern the sale of commercial paper by all state bank members of the Federal Reserve System. (87a.) The Board's action thereby not only permitted one bank to engage in these marketing activities, but in effect encouraged all member banks to do likewise. (7a, n.17.)[3]

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3 This unprecedented ruling by the Board had an immediate impact on the inter-related regulatory systems governing this nation's financial markets. Because of what was described as the "abrupt change" effected by the Board's action allowing banks "for the first time" to underwrite securities, the United States Federal Energy Regulatory Commission was required to issue a temporary blanket exemption

After the Board's ruling, the SIA and A. G. Becker commenced lawsuits under the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.*, before the District Court for the District of Columbia, challenging the ruling as contrary to law.

B. The District Court Decision

On cross-motions for summary judgment, the District Court (Joyce Hens Green, J.) held that commercial paper, which by the Board's own admission constitutes notes, fits within the proscriptions of sections 16 and 21 of the Glass-Steagall Act, prohibiting banks from dealing in corporate "notes" and "securities". The District Court refused to accept the narrow statutory construction proposed by the Board, noting that "[t]he statute draws broad lines, leaving no room for administrative amendment." (59a.)

The District Court also rejected the Board's "functional" argument that, because of its relatively short maturity, the nature of its purchasers, as well as other non-bank related factors, commercial paper functioned more as a commercial loan than as a security. That analysis was fundamentally incorrect, the District Court declared, because it "ignores the specific conduct of the bank, glossing over whether the bank purchases commercial paper for its own account . . . or purchases for future sale to an outside party or arranges a transaction between purchaser and seller." (62a.)

Holding the Board's ruling to be contrary to law, the District Court concluded that the Board had improperly redrawn the Congressionally mandated boundary between commercial and investment banking (63a; footnote omitted):

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from certain provisions of the Federal Power Act, 16 U.S.C § 8251d(b). *See* Order in Docket No. EL 81-5-000, March 27, 1981, 46 Fed. Reg. 19980 (April 2, 1981). The Securities and Exchange Commission was required to respond similarly to the Board's ruling, pursuant to its responsibilities under the Public Utility Holding Company Act. *See* SEC, Public Utility Holding Co. Act Release No. 35-21967 (March 18, 1981), 46 Fed. Reg. 18535 (March 25, 1981).

The realignment of our nation's financial industries is for the elected representatives of our nation to bring to fruition by comprehensive legislation, and not for fiat by judicial decree or by administrative policymaking.

C. The Court of Appeals Decision

In a split decision, the Court of Appeals reversed the District Court.

1. The Majority Opinion

The majority's principal reason for reversal was its view that, although the issue presented was purely legal in nature, the Board should be free to "adapt" the statute on a "case-by-case basis" according to the Board's view of "current business reality." (9a.) Despite the broad language of sections 16 and 21 of the Act, prohibiting banks from underwriting all corporate "notes" and "securities," and despite this Court's repeated direction that those terms are *not* to be construed narrowly, the majority concluded that a "narrower meaning" should be accorded the statutory terms. (16a.) In the majority's view, the terms include only "instruments for raising capital as part of the permanent financial structure of a corporation," while "implicitly permitting" banks to underwrite all other types of debt instruments. (17a.)

The majority also addressed the Board's "functional analysis." While recognizing that, in a traditional loan transaction, a bank *purchases* commercial paper, the majority held that the bank here "is simply on the other side of the transaction." (27a.) Thus viewing the role of the bank as immaterial, the majority focused instead on characteristics such as the financial soundness of commercial paper issuers, the sophistication of its purchasers and the relatively low risk nature and short maturity of commercial paper, to conclude that such notes do not give rise to the hazards at which the Glass-Steagall Act was directed. (25a-30a.)

The majority held that the terms "notes" and "securities" in the Act did not encompass "prime quality commercial paper,

of maturity less than nine months, sold in denominations of over $100,000 to financially sophisticated customers rather than to the general public." (30a; footnote omitted.) Significantly, however, it conceded that other commercial paper "of smaller denominations, or issued to the general public" (31a) could well be a "note" or "security" under the Act. The majority's holding, in short, was based upon its conclusion that the Board is free to define what "securities" are covered by the Act based solely upon the Board's assessment of the hazards that banks might encounter in underwriting them.

2. The Dissent

Senior Circuit Judge Robb dissented from the majority's analysis, finding that "the majority's holding contravenes the fundamental policy of the Glass-Steagall Act." (31a.) Judge Robb rejected the functional analysis followed by the Board and adopted by the majority, noting, as had the District Court, that it ignores the bank's role, which is actually "[t]he critical distinction between commercial banking and investment banking." (32a.)

Judge Robb also rejected the majority's focus on factors such as low default rates and sophistication of investors, pointing out that by "[r]elying on these factors, a bank could transform 'transactions unquestionably at the heart of the securities industry into permissible activity for commercial depository banks.' " (33a.) Judge Robb observed that Congress flatly prohibited bank underwriting of corporate securities "without regard to the likely 'soundness' of the securities which a bank might sell." (36a.) As he stressed, the Act "has no provision permitting bank sales of securities which are 'prime quality' or 'very low-risk'." (34a.) Judge Robb also found that bank marketing of commercial paper gives rise to precisely the sort of potential abuses and hazards reviewed by this Court in *Investment Co. Institute* v. *Camp*, 401 U.S. 617 (1971) ("*ICI*").

Finally, Judge Robb disagreed completely with the majority's attempt to "force a narrow meaning onto the terms of the

Act." (37a.) In his view, the terms used by Congress—"stocks," "bonds," "debentures," "notes" and "other securities"—are all-encompassing and were intended to be so.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS RAISES IMPORTANT ISSUES OF NATIONAL SIGNIFICANCE

The majority opinion below permits *ad hoc* administrative determination of permissible bank securities activities, defeating the flat prohibition of the Glass-Steagall Act and inevitably expanding the caseload of the federal judiciary as review of these *ad hoc* rulings is continually sought. Action by this Court is thus essential to resolve determinative issues concerning both the scope of activities that are permitted to banks by federal law and the manner in which federal regulation of financial institutions is to be carried out in the future.

First. The decision below is of general applicability, affecting the scope of activities of all of this nation's depository institutions. As both the District Court and the Court of Appeals recognized, the Board's action under review will have much broader impact than merely allowing one bank to underwrite commercial paper. If upheld, it in effect permits *all* 14,000 banks in this country to do likewise, for the first time in half a century. (7a, n.17; 51a-52a, n.7.) At the end of 1982, more than $166 billion in commercial paper was outstanding in the United States. 69 Fed. Res. Bull. A26 (March 1983).

Second. This action raises fundamental questions concerning the authority of federal bank regulators to "adapt" the basic Congressional restrictions on bank activities to their own-desired ends. Although the majority viewed the Act as permitting the Board to "adapt" it on a "case-by-case basis", to accommodate the Board's view of "current business reality" (9a), there is nothing in the statute itself, its legislative history,

or the prior decisions of this Court to support such a novel proposition. Rather, sections 16 and 21 of the Act contain flat prohibitions that are to be applied strictly, and as they were written.[4]

Congress did consider proposals, both when it originally enacted and when it first amended the Act, to permit regulators to define acceptable underwriting activities of banks; but Congress rejected completely such a regulatory approach.[5] Indeed, in 1935, the Conference Committee deleted language passed by the Senate which would have amended the Act to permit "national banks under regulation by the Comptroller of the Currency, to underwrite and sell bonds, debentures and notes. . . ."[6]

As recently as 1980, Congress reaffirmed its opposition to permitting administrative adjustment of the Glass-Steagall prohibitions. In enacting the Depository Institutions Deregulation and Monetary Control Act of 1980, P.L. No. 96-221, 94 Stat.

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4 In marked contrast with section 32 of the Act, 12 U.S.C. § 78, which permits the Board to exempt certain arrangements from the Act's management interlock provisions, neither section 16 nor section 21 vests *any* exemptive authority whatsoever in the Board to permit bank underwriting of corporate securities. The absolute approach chosen by Congress in the Glass-Steagall Act is also underscored by comparison with other banking legislation, such as the Bank Holding Company Act, 12 U.S.C. § 1841, *et seq.*, in which Congress *did* vest regulatory power in the Board to authorize bank holding companies to engage in those activities the Board finds to be "so closely related to banking as to be a proper incident thereto." 12 U.S.C. § 1843(c)(8).

5 The Senate Banking Committee originally considered and rejected several proposals which would have permitted banks to continue to engage in the securities business under a system of federal regulation. *See, e.g.*, H. Willis and J. Chapman, *The Banking Situation*, 67-69 (1934).

6 *See* H. R. Conf. Rep. No. 1822, 74th Cong., 1st Sess. 53 (1935). *See also*, S. Rep. No. 1007, 74th Cong., 1st Sess. 16 (1935); 79 Cong. Rec. 13706 (1935) (remarks of Rep. Steagall); 79 Cong. Rec. 11934-35 (1935) (remarks of Sen. LaFollette).

132 (1980), Congress extended to the Comptroller of the Currency authority to issue such rules as were needed to "carry out the responsibilities of the office," but specifically made clear that the Comptroller had *no* authority to issue regulations concerning "securities activities of National Banks under the Act commonly known as the 'Glass-Steagall Act'." 12 U.S.C. § 93a. The majority below nevertheless acquiesced in the Board's unilateral assumption of precisely the sort of broad regulatory authority that Congress repeatedly has rejected.

The majority's decision is all the more significant because during several recent terms, including the present one, Congress has been considering major legislative proposals that would, if enacted, materially alter the existing regulatory framework governing financial institutions. In each of its last three terms Congress enacted major reforms to the federal banking laws[7] but, in each instance, Congress has determined not to modify the Glass-Steagall Act restrictions in the slightest.[8]

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7 *See* Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (1982); Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (1980); Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, 92 Stat. 3641 (1978).

8 To the contrary, Congress has reaffirmed its support for the flat prohibitions contained in the Act, denying, as noted, any authority for the Comptroller of the Currency to issue regulations under the Act, 12 U.S.C. § 93a, and most recently refusing to extend to banks the limited authority to underwrite revenue bonds or to distribute shares of open-end mutual funds, activities prohibited by the Act. *Compare* S. 1720, 97th Cong., 1st Sess. (1981) (proposing authority for banks to underwrite revenue bonds and mutual funds) *with* P.L. No. 97-320, 96 Stat. 1469 (1982) (containing no such authority). *See also*, *Hearings Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, 97th Cong., 2d Sess. 6-10 (1982) (testimony of Hon. Donald T. Regan, Secretary of the Treasury).

As a result, under extreme pressure from the institutions they regulate, federal banking agencies have simply begun to dismantle the Glass-Steagall Act through administrative "interpretation." Within the past year, alone, banks have been permitted to commence, for the first time since the Glass-Steagall Act was adopted 50 years ago, a variety of securities activities previously understood to be barred to banks. For example:

— although this Court held in *ICI* that shares in bank-created and bank-operated collective investment funds constitute "securities" within the meaning of the Act, one banking agency recently ruled that shares in such funds do *not* constitute "securities";[9]

— despite the Act and *ICI*, one banking agency has recently held that banks may distribute securities through shell subsidiaries;[10] and

— the Act and *ICI* notwithstanding, three banking agencies have separately ruled that banks may enter into the public securities brokerage business, including in one instance investment advisory services, either directly or through subsidiaries.[11]

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9 *Decision of the Comptroller of the Currency on the Application by Citibank To Establish Common Trust Funds for the Collective Investment of Individual Retirement Account Trusts* (October 28, 1982).

10 *FDIC Statement of Policy on the Applicability of the Glass-Steagall Act to Securities Activities of Subsidiaries of Insured Non-member Banks*, 47 Fed. Reg. 38984 (September 3, 1982).

11 *BankAmerica Corp. (Schwab)*, 69 Fed. Res. Bull. 105 (1983); *Decision of the Comptroller of the Currency on the Application by Security Pacific National Bank to Establish an Operating Subsidiary To Be Known as Security Pacific Discount Brokerage Services, Inc.* (August 26, 1982); *Decision of the Federal Home Loan Bank Board on the Service Corporation Application of Coast Federal Savings & Loan Association, Perpetual American Federal Savings & Loan Association and California Savings & Loan Association* (May 6, 1982).

As expected, each of these administrative actions is now subject to court challenge.[12]

If permitted to stand, the majority opinion will encourage bank regulators to continue assuming policy decisions of enormous economic and legal significance that should properly be addressed only by Congress. Also, the majority opinion will inevitably promote constant litigation challenging these *ad hoc* efforts to explore and expand the boundaries of the Act, possibly leading to unwarranted lower court decisions. These results are likely to be avoided only if this Court acts to reaffirm the limited role of banking regulators in connection with the statute's flat prohibition against bank securities activities.

Third. The majority opinion raises fundamental questions concerning the judiciary's responsibility "to construe the language employed by Congress"[13] and to enforce the complete separation of commercial banking from investment banking that Congress intended the Act to achieve. The opinion accords undue deference to the regulator's interpretation of the Act, even though the issues involved are, as the Board conceded, purely legal in nature.[14] (69a, 86a.) As a consequence,

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12 *See Investment Co. Inst.* v. *Conover*, No. 83-0549 (D.D.C., filed Feb. 24, 1983); *Investment Co. Inst.* v. *United States*, No. 82-2532 (D.D.C., filed Sept. 8, 1982); *Securities Industry Ass'n* v. *Board of Governors*, No. 83-4019 (2d Cir., filed Feb. 3, 1983); *Securities Industry Ass'n* v. *Conover*, No. 82-2865 (D.D.C., filed Oct. 6, 1982); *Securities Industry Ass'n* v. *Federal Home Loan Bank Bd.*, No. 82-1920 (D.D.C., filed July 12, 1982).

13 *Zuber* v. *Allen*, 396 U.S. 168, 193 (1969). *See also*, *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 93-5 (1973); *Barlow* v. *Collins*, 397 U.S. 159, 167 (1970).

14 The majority simply refused to adhere to the teaching of this Court that discussion of deference is "pointless" where an administrative agency sanctions an activity that violates plain statutory language and purposes. *Federal Election Comm'n* v. *Democratic Senatorial Cam-*

the majority decision, if not reversed, will signal to the lower courts and to the federal regulators, abdication of the judiciary's responsibility to prevent the piecemeal, administrative dismantling of this fundamental federal statute.

In short, given its far-reaching scope and effect, the majority opinion below warrants review by this Court.

II.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH CONTROLLING DECISIONS OF THIS COURT AND RAISES SUBSTANTIAL QUESTIONS OF FEDERAL LAW CONCERNING THE PERMISSIBLE ACTIVITIES OF ALL BANKS

Disregarding this Court's repeated admonition that the prohibitions of the Glass-Steagall Act are to be construed broadly and applied literally, the majority opinion below constricts the reach of the Act and endorses a regulatory approach that would encourage administrators to exempt a whole host of securities from the Act's prohibitions.

A. The Majority Opinion Permits Bank Underwriting Activities Prohibited By the Plain Language of the Glass-Steagall Act and By Applicable Decisions of This Court

The Glass-Steagall Act represented the Congressional reaction to the financial chaos of the late 1920's and the ensuing banking crisis of the early 1930's. As this Court has observed, the Act was a "drastic step" considered by Congress to be "a prophylactic measure directed against conditions that the experience of the 1920's showed to be great potentials for abuse." *ICI*, 401 U.S. at 629, 639.

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paign Comm., 454 U.S. 27, 31 (1981) ("courts are the final authorities on issues of statutory construction"). *See also, American Ship Bldg. Co. v. N.L.R.B.*, 380 U.S. 300, 318 (1965) (resort to deference "cannot be allowed to slip into a judicial inertia in the unauthorized assumption by an agency of major policy decisions properly made by Congress").

The broad prohibitions of Section 21 of the Act preclude any entity engaged in underwriting "stocks, bonds, debentures, notes, or other securities" from simultaneously accepting deposits. (12 U.S.C. § 378.) In parallel fashion, section 16 of the Act prohibits banks from underwriting "any issue of securities or stock." (12 U.S.C. § 24 (Seventh).) To further the remedial objective of Congress, this Court has admonished, in *every* case which has considered the meaning of terms of the Glass-Steagall Act, that its prohibitions are not to be accorded a narrow or technical meaning.[15] Specifically, as to the term "securities," this Court has instructed:

> [T]here is nothing in the phrasing of either § 16 or § 21 that suggests a narrow reading of the word securities. To the contrary, the breadth of the term is implicit in the fact that the antecedent statutory language encompasses not only equity securities but also securities representing debt.

ICI, 401 U.S. at 635.

Unaffected by this Court's decisions and the Board's own admission that commercial paper falls within the plain language of the statute, (4a),[16] the majority gave the statutory

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15 *See Board of Governors* v. *Investment Company Institute*, 450 U.S. 46, 65 (1981); *ICI*, 401 U.S. at 635; *Board of Governors* v. *Agnew*, 329 U.S. 441, 446-47 (1947); *Awotin* v. *Atlas Exchange National Bank*, 295 U.S. 209, 212 (1935) (construing terms of the McFadden Act re-enacted as part of the Glass-Steagall Act).

16 That Congress intended the words "notes" and "securities" to mean what they say and to encompass commercial paper is confirmed by the fact that in enacting the Securities Act of 1933, 15 U.S.C. § 77a, *et seq.*, just three weeks before the Glass-Steagall Act, Congress specifically rejected an effort by Senator Glass to exclude "nine months commercial paper" from the definition of "security" in that Act, and instead defined the term "security" to include "any note". 15 U.S.C. § 77b(1). *See Hearings on S. 875 Before the Senate Committee on Banking and Currency*, 73d Cong., 1st Sess. 98 (1933). *See also*, Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79, *et seq.*, enacted one business day after initial amendments to the Glass-Steagall Act were passed, in which Congress prohibited certain regulated companies from purchasing any "security" but provided an exception for the acquisition of "commercial paper and other securities" as permitted through regulation. 15 U.S.C. § § 79b(a)(16), 79i(c)(3).

language a "narrower meaning," so as to forbid banks from marketing only "instruments for raising capital as part of the permanent financial structure of a corporation" and thus "implicitly" permitting banks to underwrite *all* other debt instruments. (16a-17a.)

This limitation on the Act's broad prohibitions, however, has no source in the statutory language.[17] That Congress understands how to limit expressly the banking laws to capital raising instruments when it wants to (*see*, *e.g.*, 12 U.S.C. § 321 ("capital notes")) underscores the advertence of its failure to do so here. Indeed, to accept the majority's construction of the Act would exclude from its prohibitions numerous other instruments Congress clearly intended its plain language to encompass, *e.g.*, short-term bonds and debentures.

Even the majority realized the far-ranging consequences of abandoning the plain statutory language. Its "capital raising instrument" test, on its face, excludes all short-term debt instruments and, hence, would exclude all commercial paper—a conclusion the Board itself was unwilling to endorse. As a result, the majority simply stated, again without identifying the statutory source of the limitation, that "another type of commercial paper—*e.g.*, of smaller denominations, or issued to the general public—might be a 'security' under the Glass-Steagall Act." (31a.)

The majority opinion thus confirms the wisdom of this Court's insistence that the Act be interpreted broadly and applied literally. To ignore the plain language of the Act is to transform its flat Congressional prohibition into a loose sieve and to spawn the sort of "now-you-see-it-now-you-don't" definition to which the majority resorted. In plain language, the Act flatly and unambiguously prohibits banks from underwriting all corporate "notes" and "securities," including those notes referred to as commercial paper.

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17 The majority decision ignores the basic principle that the language employed by Congress "*must ordinarily be regarded as conclusive.*" *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982) (emphasis added; citations omitted). *Accord*, *Aaron* v. *S.E.C.*, 446 U.S. 680 (1980); *Lewis* v. *United States*, 445 U.S. 55 (1980).

B. The Majority Opinion Permits Bank Underwriting Activities that Create the Potential Hazards This Court Has Found the Glass-Steagall Act Sought to Avoid

By embracing the Board's "functional" analysis of the statutory terms, the majority opinion not only violates the plain language of the Glass-Steagall Act, but also violates Congress' fundamental objective in enacting the statute.

The majority's analysis focuses upon the characteristics of the instruments involved, while incorrectly treating a bank's role in connection with the instruments as immaterial. In so doing, the majority dismisses the difference between a bank's purchasing of commercial paper and its selling commercial paper as the bank's simply being "on the other side of the transaction." (27a.)

The Act, however, was intended to eliminate the potential for abuses and the conflicts of interest that arise whenever banks subject themselves to the "promotional incentives" and "pecuniary stake" of investment banking. *ICI*, 401 U.S. at 634. As Judge Robb recognized in dissent, the bank's role "is determinative under the Act" because "[t]he critical distinction between commercial banking and investment banking is the bank's role in the transaction." (32a.) Accordingly, any "functional" analysis under the statute must consider the *bank's* role in order to measure that involvement against the purpose of the Act. *See* Note, *A Conduct-Oriented Approach to the Glass-Steagall Act*, 91 Yale L. J. 102 (1981).

By ignoring the role of the bank, the majority's holding violates the fundamental intent of Congress. Here, the bank functions not as a lender, but simply as a marketer of securities—the bank will earn its fees based solely upon its promotional success. From the perspective of a bank, the commercial paper it markets is merely a vehicle for earning those fees. The majority below simply disregarded this Court's warning in *ICI* that:

> When a bank puts itself in competition with [securities dealers] the bank must make an accommodation to the kind of ground rules that Congress firmly concluded could not be prudently mixed with the business of commercial banking.

401 U.S. at 637.

The Board itself recognized this problem when it acknowledged in its ruling that: "[T]he sale of third party commercial paper by a commercial bank could involve, at least in some circumstances, practices that are not consistent with principles of safe banking." (84a.) The Board issued guidelines relating to the sale of commercial paper notes by banks, but such action is not, and cannot be, a sufficient response. The Glass-Steagall Act was meant to eliminate, not merely to "minimize," the potential for abuse that is *inherent* in the combination of investment and commercial banking.[18]

Similarly misconstruing the Congressional purpose, the majority reasoned that there were no potential hazards, because the notes being sold are of high quality and are purchased by sophisticated investors. But Congress made no exception for "low risk" or "prime quality" securities; instead, it preempted any such administrative judgment by prohibiting bank underwriting of *all* corporate securities. Indeed, the majority's reasoning actually proves the reverse because, as Judge Robb put it, sophisticated purchasers are "likely to be among the bank's most important and influential clientele," so that loss of their good will would be particularly "detrimental to the bank's commercial operation." (35a-36a.)

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18 As Senator Bulkley put it during Congressional debates on the Glass-Steagall Act, in language previously relied upon by this Court (*ICI*, 401 U.S. at 634; footnote omitted):

> If we want banking service to be strictly banking service, without the expectation of additional profits in selling something to customers, we must keep the banks out of the investment security business.

The recent example of Penn Central's default on $82.5 million of commercial paper notes which, only three weeks earlier, had been marketed as "prime" quality and sold in large denominations to sophisticated purchasers—and therefore would have been permissible for bank underwriting under the Board's guidelines—dramatically confirms that no number of administrative "guidelines" can effectuate the Congressional purpose. The intent of Congress can only be carried out by prohibiting the activity entirely, which is precisely what the Glass-Steagall Act was designed to do. (*See* Judge Robb's dissent at 34a-38a.)

In short, the majority's own analysis of Congressional objectives simply confirms, as does its view of the statute's plain language, that:

> [T]he majority's holding contravenes the fundamental policy of the Glass-Steagall Act . . . [which is] to insulate commercial banking from the hazards inherent in investment banking by mandating a complete separation of those two functions.

(31a; Robb, J. dissenting.)

CONCLUSION

For the foregoing reasons, the requested Writ of Certiorari should issue.

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Respectfully submitted,

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